

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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In the Matter of )  
)  
)

Application of SBC Communications, Inc. )  
Pursuant to Section 271 of the )  
Telecommunications Act of 1996 )  
To Provide In-Region, InterLATA Services )  
in California )  
\_\_\_\_\_)

WC Docket No. 02-306

**COMMENTS OF  
VYCERA COMMUNICATIONS, INC.**

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Dated: October 9, 2002

## SUMMARY

The Commission should not grant Pacific Bell Section 271 authority in light of Pacific Bell's failure to meet Checklist Items 1 and 2 and its demonstrated anticompetitive practices. Pacific Bell fails to satisfy Checklist Item 1 because it wrongfully refuses to make interconnection agreement terms available on a nondiscriminatory basis, as required by law. Currently, Pacific Bell will not permit CLECs to adopt interconnection agreements in California unless the CLEC first agrees to an extensive amendment to the agreement. Pacific Bell fails to satisfy Checklist Item 2 because it currently and consistently provides inaccurate wholesale bills.

Besides Pacific Bell's failure to meet checklist items, the grant of 271 authority to Pacific Bell is not in the public interest because of its anticompetitive behavior in its win-back practices and its related abuse of its position as (non-neutral) Primary Carrier ("PC") Administrator. Vycera has been shut out of intraLATA toll markets in Pacific Bell's service areas as the direct result of Pacific Bell's anticompetitive win-back practices in combination with Pacific Bell's abuse of its exclusive position as PC administrator. (Vycera did not experience these types of problems in neighboring Verizon California service areas in which Vycera resells intraLATA toll service nor in connection with its intraLATA toll service offerings in other ILEC regions, with the exception of SBC-SWBT territory in Texas. At a minimum, Pacific Bell's demonstrated abuse of its position as PC administrator with respect to intraLATA toll PC changes dictates against a grant of the requested Section 271 authority unless and until a competitively neutral third party PC administrator system is implemented in California.

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## LIST OF EXHIBITS

- Exhibit 1** – Notice of Adoption by Vycera Communications, Inc. f/k/a Genesis Communications International, Inc. of the Interconnection Agreement between Pacific Bell Telephone Company and AT&T Communications of California, Inc.
- Exhibit 2** - Pacific Bell Telephone Company's Application for Arbitration of Advice Letter No. 57 Filed by Vycera Communications, Inc. f/k/a Genesis Communications International, Inc., U-5477-C ("Pacific Bell Application for Arbitration"). Attachment A, AT&T Agreement, included only in relevant part: Attachment 8, Pricing; Attachment 18, Interconnection; and Amendment 3. Attachment B, "Attachment 19, Negotiated Appendix Reciprocal Compensation (After FCC Order No. 01-131), included. Attachment C, Testimony of Linda De Bella in Behalf of Pacific Bell Telephone Company's (U 1001 C) Petition in Arbitration not included.
- Exhibit 3** –Application of Vycera Communications, Inc. d/b/a Genesis Communications International (U-5477-C) to Expand Its Certificate of Public Convenience and Necessity To Provide Limited Facilities-Based Local Exchange Telecommunications Services Within the Service Territories of Pacific Bell and Verizon, Decision 02-10-016, California Public Utilities Commission (Oct. 3, 2002).
- Exhibit 4** – Response to Application By Pacific Bell Telephone Company for Arbitration with Vycera Communications, Inc., Application No. A0209018, filed Oct. 7, 2002.
- Exhibit 5** - SBC Communications Inc.'s Annual Report for 2001, dated February 8, 2002.
- Exhibit 6** – Affidavit of Derek Gietzen, Oct. 9, 2002.
- Exhibit 7** – "Win-back" letter from Pacific Bell to Derek Gietzen, June 1999.
- Exhibit 8** - Complaint, *AT&T Communications of California, Inc. v. Pacific Bell*, Case No. 99 12 029, filed Dec. 21, 1999.

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To Provide In-Region, InterLATA Services	)	
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**COMMENTS OF  
VYCERA COMMUNICATIONS, INC.**

Vycera Communications, Inc. ("Vycera") submits these Comments concerning the Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. ("Pacific Bell") for Authorization To Provide In-region, InterLATA Services In California ("Application").<sup>1</sup> Vycera is based in San Diego, California, and provides local and long distance services to residential and small business customers in numerous states. Vycera is currently one of the largest local exchange resellers in the State of California, and has just been granted certification to provide partial facilities-based local exchange service in California. Vycera has provided both local and long distance services in California since 1996. For the reasons stated in these Comments, the Commission should deny Pacific Bell's Application.

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<sup>1</sup> *Comments Requested on the Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of California*, Public Notice, WC Docket No. 02-306, DA 02-2333, released September 20, 2002.

**I. PACIFIC BELL FAILS TO SATISFY CHECKLIST ITEM 1 BECAUSE IT REFUSES TO PERMIT CLECS TO ADOPT INTERCONNECTION AGREEMENTS ON A NONDISCRIMINATORY BASIS**

**A. Legal Standard**

To satisfy Checklist Item 1,<sup>2</sup> Pacific Bell must provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of the Telecommunications Act of 1996.<sup>3</sup> Under Section 251(c)(2), an incumbent local exchange carrier has:

[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

- (A) for the transmission and routing of telephone exchange service and exchange access;
- (B) at any technically feasible point within the carrier's network;
- (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, or any other party to which the carrier provides interconnection; and
- (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.”<sup>4</sup> (Emphasis added.)

Section 252(i) provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

**B. Pacific Bell Fails to Provide Interconnection on Rates, Terms, and Conditions That Are Just, Reasonable, and Nondiscriminatory**

Pacific Bell does not meet Checklist Item No. 1 on the most basic level. Currently, Pacific Bell is deliberately and wrongfully refusing to provide interconnection to Vycera on a nondiscriminatory basis, in that it will not permit Vycera to opt in to any part of the

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<sup>2</sup> 47 U.S.C. §271(c)(2)(B)(i).

<sup>3</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>4</sup> 47 U.S.C. § 251(c)(2).

interconnection agreement arbitrated by AT&T with Pacific Bell in California (“the AT&T Agreement”)<sup>5</sup> unless Vycera first agrees to a lengthy amendment to the AT&T Agreement.

The process in California to adopt an interconnection agreement was designed to be simple and efficient.<sup>6</sup> A CLEC wishing to adopt an interconnection agreement so notifies the California Public Utilities Commission (“CPUC”) and the ILEC.<sup>7</sup> The adoption of the interconnection agreement becomes effective on the sixteenth day after the CLEC notifies the CPUC and the ILEC unless the ILEC files for arbitration,<sup>8</sup> which it can only do on very limited grounds.<sup>9</sup> Vycera notified the CPUC and Pacific Bell of its adoption of the AT&T/Pacific Bell arbitrated interconnection agreement on September 3, 2002 (Exhibit 1). Vycera wanted to be ready to start offering service via UNE-P on the date that it received its expanded “partial

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<sup>5</sup> August 14, 2000 Interconnection Agreement between SBC Pacific Bell and AT&T Communications of California, Inc.

<sup>6</sup> See California Rules Implementing the Provisions of Section 252 of the Telecommunications Act of 1996, CPUC Res. ALJ-181, Oct. 5, 2000 (“California Rules”), Rule 7.

<sup>7</sup> *Id.*, Rule 7.1.

<sup>8</sup> *Id.*, Rule 7.2

<sup>9</sup> Rule 7 of the California Rules sets out the “Process for Adopting a Previously Approved Agreement.” Rule 7.2 provides:

Within 15 days of its receipt of the Advice Letter or Letter of Intent, the ILEC shall either send the requesting carrier a letter approving its request or file a request for arbitration based solely on the requirements in § 51.809:

a. Any individual interconnection, service, or network element arrangement contained in any agreement approved by the Commission pursuant to Section 252 of the Telecommunications Act of 1996, must be made available upon the same rates, terms, and conditions as those provided in the agreement.

b. The obligations of section (a) above shall not apply where the ILEC proves to the state commission that:

(1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement.

(2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

c. Individual interconnection service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under 252(f) of the Act.

(Emphasis added.)

facilities-based certificate” from the CPUC which would authorize it to provide service via UNE-P. Pacific Bell filed for arbitration on September 18, 2002 in order to prevent Vycera’s adoption of any part of the AT&T Agreement becoming effective on the 16<sup>th</sup> day (Exhibit 2).<sup>10</sup> Vycera received its partial facilities-based certification on October 3, 2002 (Exhibit 3). Vycera filed its response to Pacific Bell’s Application for Adoption on October 7, 2002 (Exhibit 4). To date, Pacific Bell’s Application for Arbitration against Vycera is still pending, and Pacific Bell continues to maintain that Vycera may not adopt any part of the AT&T Agreement until Vycera first agrees an extensive amendment to the AT&T Agreement.

Pacific Bell asserts that it is justified in ignoring the mandate of 47 U.S.C. 252(i) based on the following chain of Pacific Bell “legal logic”:<sup>11</sup>

1. The Commission’s *Intercarrier Compensation for ISP-Bound Traffic Order* of April 2001<sup>12</sup> stated that, *inter alia*, “carriers may no longer invoke section 252(i) to opt in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic” (emphasis added);<sup>13</sup>
2. The preceding sentence in the *Intercarrier Compensation for ISP-Bound Traffic Order* applies within Pacific Bell territory in California despite the fact that Pacific Bell has not agreed to exchange all 251(b)(5) traffic in California at the same rate,<sup>14</sup> a

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<sup>10</sup> Pacific Bell Telephone Company’s Application for Arbitration of Advice Letter No. 57 Filed by Vycera Communications, Inc. f/k/a Genesis Communications International, Inc., U-5477-C (“Pacific Bell Application for Arbitration”).

<sup>11</sup> See Exhibit 2, Pacific Bell Application for Arbitration, at 5 - 8.

<sup>12</sup> *In the Matters of Implementation of Local Competition Provisions of Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 and 99-68, *Order on Remand and Report and Order*, FCC 01-131 (rel. April 27, 2001) (“*Intercarrier Compensation for ISP-Bound Traffic Order*”).

<sup>13</sup> *Id.* at ¶ 82.

<sup>14</sup> The fact that SBC Pacific Bell has not yet offered to exchange all traffic subject to section 251(b)(5) at the same rate is evidenced by a number of things, including a recital within the proposed reciprocal compensation amendment it wanted Vycera to sign in September 2002 prior to Vycera’s being allowed to opt in to any part of the AT&T Agreement. See Exhibit 2, Pacific Bell Application for Arbitration, p. 7. The reciprocal compensation amendment

precondition for application of the Commission's interim regime for compensation of ISP-bound traffic;<sup>15</sup>

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proposed to Vycera by SBC Pacific Bell can be found at Exhibit 2, Pacific Bell Application for Arbitration, Attachment B, and is entitled "Negotiated Appendix Reciprocal Compensation." Section 16.1 of the proposed amendment states:

The Parties acknowledge that on April 27, 2001, the FCC released its Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic* (the "ISP Compensation Order") which was remanded in *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. 2002). The Parties agree that by executing this Appendix and carrying out the intercarrier compensation rates, terms and conditions herein, neither Party waives any of its rights, under the ISP Compensation Order, or any other regulatory, legislative or judicial action including but not limited to the ILEC's option to invoke on a date specified by ILEC the FCC's ISP terminating compensation plan, after which date ISP-bound traffic will be subject to the FCC's prescribed terminating compensation rates, and other terms and conditions.

Section 16.2 of SBC Pacific Bell's proposed reciprocal compensation amendment goes on to state:

ILEC agrees to provide 20 days advance written notice to the person designated to receive official contract notices in the underlying Interconnection Agreement of the date upon which the ILEC designates that the FCC's ISP terminating compensation plan shall begin in this state. CLEC agrees that on the date designated by ILEC, the Parties will begin billing Reciprocal Compensation to each other at the rates, terms and conditions specified in the FCC's terminating compensation plan.

Also see Amendment No. 3 to the AT&T Agreement at Exhibit 2, Pacific Bell Application for Arbitration, Attachment A, which recites:

Pacific further notes that on April 27, 2001, the FCC released its Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic* (the "ISP Intercarrier Compensation Order.") By executing this Amendment and carrying out the intercarrier compensation rates, terms and conditions herein, Pacific does not waive any of its rights, and expressly reserves all of its rights, under the ISP Intercarrier Compensation Order, including but not limited to its right to exercise its option at any time in the future to invoke the Intervening Law or Change of Law provisions and to adopt on a date specified by Pacific the FCC ISP terminating compensation plan, after which date ISP-bound traffic will be subject to the FCC's prescribed terminating compensation rates, and other terms and conditions. (Emphasis added.)

Also see Exhibit 5, SBC Communications Inc.'s Annual Report for 2001, dated February 8, 2002, p. 16, Reciprocal Compensation, which references the *FCC Intercarrier Compensation for ISP-Bound Traffic Order*, referring to it as the "April 2001 order," and states that:

The FCC transition plan is optional for incumbent local exchange carriers and in order to opt into the plan, incumbents must offer to exchange local and wireless traffic at the same compensation rate as internet traffic. To date, none of our wireline subsidiaries have opted into the transition plan.

Vycera is unaware of Pacific Bell exercising such an option subsequent to its signing of the AT&T Agreement, nor has Pacific Bell alleged in the Pacific Bell Application for Arbitration or supporting testimony that it has done so. At no time has Pacific Bell offered to Vycera an agreement incorporating (as opposed to preserving the right to adopt) the FCC ISP terminating compensation plan.

<sup>15</sup> *Intercarrier Compensation for ISP-Bound Traffic Order* at ¶ 89:

It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher

3. Since Pacific Bell can preclude Vycera from adopting “rates paid for the exchange of ISP-bound traffic,” regardless of Pacific Bell’s refusal to exchange all traffic subject to section 251(b)(5) at the same rate in California, it can also preclude Vycera from adopting “terms reasonably related” to the “rates paid for the exchange of ISP-bound traffic”;
4. The “terms reasonably related” to the “rates paid for the exchange of ISP-bound traffic” in the AT&T Agreement are extensive<sup>16</sup> and need to be replaced with Pacific Bell’s twenty-one page “13-state template” for reciprocal compensation (Exhibit 2, Pacific Bell Application for Arbitration, Attachment B);
5. Since Vycera would not agree to the amendments to the AT&T Agreement proposed by Pacific Bell, and since, per Pacific Bell, adoption of an extensive portion of the AT&T Agreement was “not permitted by operation of law,”<sup>17</sup> Vycera was attempting to adopt an “incomplete agreement” and Pacific Bell cannot be required to implement a partial agreement.

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than the caps we adopt here, when the traffic imbalance is reversed. [FN 176] Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to “pick and choose” intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, only<sup>15</sup> if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) [FN 177] at the same rate. Thus, if the applicable rate cap is \$.0010/mou, the ILEC must offer to exchange section 251(b)(5) traffic at that same rate. Similarly, if an ILEC wishes to continue to exchange ISP-bound traffic on a bill and keep basis in a state that has ordered bill and keep, it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis. [FN 178] For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. [FN 179] This mirroring rule insures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic. (Underlined emphasis added.)<sup>15</sup>

<sup>16</sup> In the Pacific Bell Application for Arbitration, Pacific Bell states that “[t]he terms and conditions that are legitimately related to the rates for ISP-bound traffic are contained in Sections 2, 3, and 5 of Attachment 18 of the AT&T Agreement and involve compensation for call termination.” Exhibit 2, Pacific Bell Application for Arbitration at 6. Vycera was sent a twenty-one page draft (Exhibit 2, Pacific Bell Application for Arbitration, Attachment B) as a proposed replacement for the AT&T Agreement sections SBC Pacific Bell wanted Vycera to except from its adoption notice “in order to assist Vycera in acquiring a full agreement with Pacific.”

<sup>17</sup> Exhibit 2, Pacific Bell Application for Arbitration at 9.

Pacific Bell therefore starts with the *Intercarrier Compensation for ISP-Bound Traffic Order*'s sentence that "carriers may no longer invoke section 252(i) to opt in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic" (ignoring the fact that there are preconditions for application of the FCC's interim compensation regime for ISP-bound traffic) and expands that sentence all the way to "Vycera, you can't adopt an existing agreement all unless you let us rewrite twenty-one pages of it, and if you do not accede to our proposal within the 15 days between notice of the adoption and the effective date, you will find yourself in an arbitration proceeding with no provisions of the interconnection agreement you seek to adopt in effect at all."

Pacific Bell's refusal to permit Vycera to adopt the AT&T Agreement, built upon the sentence from the *Intercarrier Compensation for ISP-Bound Traffic Order* that "carriers may no longer invoke section 252(i) to opt in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic," is particularly untenable because the AT&T Agreement already says that "[t]he compensation arrangements set forth in this Attachment [the Interconnection Attachment, Attachment 18] are not applicable to . . . any other type of traffic found to be exempt from reciprocal compensation by the FCC or the Commission."<sup>18</sup> If the *FCC Intercarrier Compensation for ISP-Bound Traffic Order*'s interim compensation regime for ISP-bound traffic were determined to apply in Pacific Bell territory in California, the rate to be paid Vycera for ISP-bound traffic would be \$0.00 (bill-and-keep), Vycera being a carrier not exchanging traffic pursuant to interconnection agreements prior to adoption of the FCC Order (Vycera has only provided services to date on a resale basis). Since the AT&T Agreement already excludes reciprocal compensation payments for ISP-bound traffic to the extent that ISP-

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<sup>18</sup> AT&T Agreement, Attachment 18, Section 3.4.

bound traffic is exempt pursuant to FCC or CPUC order, there is no legitimate basis whatsoever to preclude Vycera into adopting any part of the AT&T Agreement or to demand that Vycera “negotiate” new provisions prior to adoption.<sup>19</sup> Pacific Bell wrongfully turned a simple adoption request first into a negotiation, and then into an arbitration, at great expense to Vycera.

The twenty-one pages of revisions proposed by Pacific Bell to the arbitrated agreement Vycera seeks to adopt “reasonably relate” only to Pacific Bell’s effort to find a semi-plausible basis upon which to entice CLECs, who cannot offer services without an interconnection agreement in place, into agreeing to higher rates and terms far less favorable than those to which they are legally entitled. For example, the rates for “Transiting-Local Traffic” (not a reciprocal compensation rate) that Pacific Bell tucked into the proposed Reciprocal Compensation Amendment it wanted Vycera to sign before Vycera would be allowed to adopt the AT&T Agreement are far higher than those applicable under the AT&T Agreement (\$0.0011300 setup per call, \$0.0027700 holding term per MOU under the proposed Reciprocal Compensation amendment proposed by Pacific Bell<sup>20</sup> versus \$0.000750 setup per attempt, \$0.0011300 setup per completed message, \$0.000670 holding time per MOU under the AT&T Agreement which Vycera is entitled to adopt).<sup>21</sup> Because Carriers such as Vycera offering local service via UNE-P do not provide transit switching, only Vycera, not Pacific Bell, would be paying the higher charges for “Transiting-Local Traffic.”

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<sup>19</sup> To the extent that SBC Pacific Bell mounts an argument that the clause in the current AT&T Agreement which already precludes payment for traffic if prohibited by FCC order is “unclear,” which Vycera strongly believes it is not, now is not the time to debate that point. That time would come if, in the future, one of the parties demanded compensation for ISP-bound traffic, and the other party claimed it was not payable. That may never happen.

<sup>20</sup> Exhibit 2, Pacific Bell Application for Arbitration, Attachment B, “Negotiated Appendix Reciprocal Compensation (After FCC Order No. 01-131),” at p. 21, Appendix Pricing.

<sup>21</sup> AT&T Agreement, Attachment 8 Pricing: Appendix C, Section 3.1; Section 5.4; Appendix A-1, p. 1.

With regard to Checklist Item 1, Pacific Bell is not complying with its “duty to provide . . . interconnection . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252.”<sup>22</sup> Pacific Bell is choosing, as an on-going matter, to deny CLECs the ability to adopt interconnection agreements in California as required by section 252(i). Rather than making the AT&T Agreement available to CLECs in its entirety, as it is required to do by law, Pacific Bell chooses to block adoptions and make the opt-in process for CLECs expensive, complicated, time-consuming, a contractual mine-field, and a means of securing for itself higher rates and twenty-one pages of future Pacific Bell-favorable litigation fodder. The Commission should deny Pacific Bell’s 271 Application based upon Pacific Bell’s ongoing and deliberate anticompetitive acts in refusing to comply with section 252(i) and thus its failure to satisfy Checklist Item 1.

## **II. PACIFIC BELL FAILS TO SATISFY CHECKLIST ITEM 2 BECAUSE IT DOES NOT PROVIDE READABLE, AUDITABLE AND ACCURATE WHOLESALE BILLS**

### **A. Legal Standard**

Checklist Item 2 requires that a BOC provide non-discriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1).<sup>23</sup> In the *Verizon Pennsylvania Order*,<sup>24</sup> the Commission stated that a Bell Operating Company must demonstrate that it can produce a readable, auditable, and accurate wholesale bill in order to

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<sup>22</sup> 47 U.S.C. § 251(c)(2).

<sup>23</sup> 47 U.S.C. § 271(c)(2)(B)(ii).

<sup>24</sup> *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419 (2001) (*Verizon Pennsylvania Order*).

satisfy its nondiscrimination requirements under checklist item 2.”<sup>25</sup> As the FCC has noted, CLECs need readable, auditable, and accurate wholesale bills for a number of reasons:

Inaccurate or untimely wholesale bills can impede a competitive LEC’s ability to compete in many ways. First, a competitive LEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC. Accurate and timely wholesale bills in both retail and BOS BDT formats thus represent a crucial component of OSS.<sup>26</sup>

#### **B. Pacific Bell Fails To Provide Accurate Wholesale Bills to CLECs**

Vycera’s wholesale bills from Pacific Bell are inaccurate to such a degree that Vycera has spent literally hundreds, possibly thousands, of hours developing mechanized audits for its local resale bills. Vycera has basically had to duplicate Pacific Bell’s entire billing system in-house, so that for every single item it is charged for, it can determine the correct charge and institute another billing dispute if necessary. The ongoing enormity of overbilling by Pacific Bell has forced Vycera to maintain Pacific Bell’s entire local resale tariff in Vycera’s billing system in order to attempt to audit Pacific Bell’s bills. Vycera has a team of personnel who each week review the mechanized audits, spot check by doing manual audits, create and submit disputes. Vycera has done this out of necessity, not out of desire. Vycera is a small company with a limited budget, but Pacific Bell’s bills did and still do contain so many overbillings, and the dollars at stake were, and are, so large, that Vycera cannot afford not to audit Pacific Bell’s bills continually in the way that it does.

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<sup>25</sup> *Id.* at ¶ 22.

<sup>26</sup> *Id.* at ¶ 23 (citations omitted).

Billing issues have included:

- On many occasions, even though Vycera's customer is PIC'd to Vycera for intraLATA toll, Pacific Bell carries the call itself anyway, and then bills Vycera wholesale rates for the intraLATA call. It is much less expensive for Vycera to carry the call directly (using its underlying carrier for long distance service).
- Pacific Bell does not resolve billing errors promptly; some disputes have dragged out over a year.
- Pacific Bell files tariffed rate increases, and bills Vycera at the increased rate for services performed prior to the effective date of the rate increase. Conversely, Pacific Bell files tariffed rate decreases, then continues to bill Vycera at the prior, higher rate.
- Pacific Bell double-billed Vycera for custom calling services on single line accounts.
- Pacific Bell bills Vycera for services that are free (as it did, for example, for Anonymous Call Rejection for Caller I.D. customers).
- Pacific Bell bills retail rates for certain items without applying the resale discount (as it did, for one example, with the migration fee for "works" or "basic" packages).
- When bill corrections are finally approved, the corrections often take months before they are reflected on Vycera's wholesale bills.
- When corrections are made and billing credits are finally given, Pacific Bell frequently fails to provide information necessary to permit Vycera to reconcile the correction with the original bill.

As the Commission can see, Pacific Bell's wholesale billing operations are woefully inadequate. Pacific Bell's poor provisioning of wholesale bills to Vycera has severely impaired

Vycera's ability to provide local exchange service. The Commission should reject Pacific Bell's application for failing to satisfy Checklist Item 2.

### **III. PACIFIC BELL'S APPLICATION IS NOT IN THE PUBLIC INTEREST**

#### **A. The Standard**

Section 271(d)(3)(C) of the Act directs that the Commission shall not grant Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."<sup>27</sup> This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.<sup>28</sup> The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."<sup>29</sup> As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."<sup>30</sup> The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."<sup>31</sup>

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The

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<sup>27</sup> 47 U.S.C. § 271(d)(3)(C).

<sup>28</sup> See 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

<sup>29</sup> *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("Ameritech Michigan 271 Order").

<sup>30</sup> *Id.* at n. 992, quoting, S. Rep. Mo. 23, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 44 (1995).

<sup>31</sup> *Id.*

Commission noted that under the standard it was given “broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest.”<sup>32</sup> The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.<sup>33</sup> The Commission explicitly recognized that “Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority.”<sup>34</sup>

Predictably, the RBOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.<sup>35</sup> BellSouth also contended that the Commission’s responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.<sup>36</sup> The Commission rejected both of these claims and reaffirmed that it will consider “whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market.”<sup>37</sup> The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the “BOC has undertaken all actions necessary to

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<sup>32</sup> *Ameritech Michigan 271 Order* at ¶ 383.

<sup>33</sup> *Id.* at ¶ 385.

<sup>34</sup> *Id.*

<sup>35</sup> *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 361 (1998).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

assure that its local telecommunications market is, and will remain, open to competition.”<sup>38</sup> As the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.<sup>39</sup>

The importance of the public interest standard was recently reaffirmed by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.<sup>40</sup> In that letter the Senators stated:

[t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.<sup>41</sup>

**B. The Importance of the Public Interest Standard In Establishing Genuine Competition**

A viable public interest standard will enable the Commission to look beyond technical checklist considerations and determine if competition has actually taken root in a particular state. The experiences of the California PUC demonstrates that one can find an application to be technically compliant with the checklist while still having reservations about the development of competition in the state.<sup>42</sup> Without an independent public interest standard, a RBOC that has a history of limiting competition in a particular state can at the last minute implement the minimum requirements necessary to satisfy this Commission, and allege checklist compliance

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<sup>38</sup> *Ameritech Michigan 271 Order* at ¶ 386.

<sup>39</sup> *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also*, *Ameritech Michigan 271 Order* at ¶ 382.

<sup>40</sup> Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) (“*Senators’ Letter*”).

<sup>41</sup> *Id.* at 3.

without the development of actual, viable local competition in the state. An independent public interest standard would defeat such an approach and encourage future applicants to promote the development of true competition in the state.

In addition, a viable public interest standard will guard against the perils of a premature grant of Section 271 authority. If an RBOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.<sup>43</sup> As Dr. Cooper of the Consumer Federation of America noted:

[t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or ‘competitive imbalance,’ in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.<sup>44</sup>

As the Commission has also noted:

Section 271, however embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.<sup>45</sup>

While a BOC’s entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market remains open after

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<sup>42</sup> In fact, as noted below, the CPUC did not find the application to be fully compliant with the checklist as it found non-compliance with Checklist Items 11 and 14.

<sup>43</sup> *Rulemaking on the Commission’s Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission’s Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission’s Own Motion Into Competition for Local Exchange Service*, California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001) (“CFA CA Comments”).

<sup>44</sup> *Id.*

BOC entry.<sup>46</sup> Thus, all the focus on the purported benefits of Pacific Bell entering the long distance markets in California is putting the cart before the horse. The local market has to be truly open to competition for those benefits to take root.

**C. The CPUC Has Conducted an Extensive Public Interest Inquiry to Which This Commission Should Attach Significant Weight**

The California PUC has conducted an extensive and comprehensive public interest analysis in the context of Pacific Bell's Section 271 California application, based on the California PUC's unique practical experience, knowledge, and understanding of the California marketplace and its long-standing experience with Pacific Bell's practices. The public interest consideration is rooted in a state statutory provision that predates the 1996 Act. In 1994, the California State Legislature enacted Section 709.2 of the Public Utilities Code. The legislation envisioned that Pacific would be allowed to enter into the long distance market only after ensuring that there is no substantial probability of harm to the long distance market.<sup>47</sup> To make this determination, the CPUC would have to develop a factual record and make an assessment of Pacific Bell's market power in the local service market.<sup>48</sup>

Specifically the CPUC is required to make four determinations prior to authorizing Pacific Bell's entry into the long distance market. These determinations include: 1) that competitors have fair, nondiscriminatory access to exchanges; 2) that there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber contacts

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<sup>45</sup> *Ameritech Michigan 271 Order* at ¶ 388.

<sup>46</sup> *Id.* at ¶ 390.

<sup>47</sup> *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, CPUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044, Affidavit of John F. Sumpter on Behalf of Pac-West Telecomm, Inc. at ¶¶ 7-9 (August 23, 2001) ("Sumpter Affidavit").

generated by the provision of local exchange telephone service; 3) that there is no improper cross-subsidization of interexchange telecommunications service; and 4) that there is "no substantial possibility of harm" to the competitive intrastate interexchange telecommunications markets.<sup>49</sup>

It is clear that many of the same determinations that frame the CPUC's determination under Section 709.2 are applicable and highly relevant to this Commission's determination under the Section 271 public interest standard. For example, the determination as to whether competitors have fair, nondiscriminatory access to exchanges pertains to whether Pacific Bell has opened its local markets to competition. A determination that there is "no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber contacts generated by the provision of local exchange telephone service" relates to whether there are any anticompetitive activities that will create barriers to opening markets and imperil competition once markets are opened. The third factor, requiring a finding that there will be no improper cross-subsidization of interexchange telecommunications service, lies at the heart of why RBOCs are precluded from providing long distance service until the requirements of Section 271 are satisfied. Finally, the fourth factor requires an examination of the effect of Pacific Bell's entry into the long distance market, a consideration to which Pacific Bell itself devotes a considerable portion of its application.<sup>50</sup> Ultimately both Section 709.2 and Section 271's public interest standard hinge on the existence or absence of market power in the hands of Pacific Bell.<sup>51</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Cal. Pub. Util. Code §§ 709.2(c)(1)-(4).

<sup>50</sup> See Pacific Bell Application at 83-87.

<sup>51</sup> Sumpter Affidavit at 12.

Perhaps even more important than the overlap in determinations Section 709.2 and Section 271(d)(3) require is the substantial record the CPUC has developed on the issue of what is in the public interest in California. The CPUC conducted a separate phase of its Section 271 proceeding devoted exclusively to the public interest issue. The proceeding involved a submission by Pacific Bell including affidavits, exhibits, and other documents. Interested parties were then given an opportunity to respond, and Pacific Bell had a chance to reply. Oral arguments were made and considered.<sup>52</sup>

Pacific Bell would have this Commission disregard not only the determinations made by the CPUC on the issue of the public interest, but also the extensive record elicited in the proceeding. Pacific Bell states that this Commission “has no obligation even to consult the state commission regarding the public interest, much less to give its determination any weight.”<sup>53</sup> There is, however, nothing that precludes a state commission from conducting such an inquiry, and, in fact, state commissions, as part of their consultation reports, have often commented on the public interest standard.<sup>54</sup> The Commission considers the state commission’s report on

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<sup>52</sup> *Rulemaking on the Commission’s Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission’s Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service, Order Instituting Investigation on the Commission’s Own Motion into Competition for Local Exchange Service*, CPUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044, Decision Granting Pacific Bell Telephone Company’s Renewed Motion for an Order That It Has Substantially Satisfied the Requirements of the 14-Point Checklist in § 271 of the Telecommunications Act of 1996 and Denying That It Has Satisfied § 709.2 of the Public Utilities Code, Decision 02-09-050 at 213 (September 19, 2002) (“CPUC 271 Order”).

<sup>53</sup> Pacific Bell Application at 95.

<sup>54</sup> See, e.g., *Application by Verizon New England, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Rhode Island*, CC Docket No. 01-324, Rhode Island Public Utilities Commission’s Evaluation of Verizon Rhode Island’s Compliance with Section 271 of the Telecommunications Act of 1996 at 188-192 (Dec. 14, 2001); *Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in Arkansas and Missouri*, CC Docket No. 01-194, Written Consultation of the Missouri Public Service Commission at 27-28 (Sept. 10, 2001).

public interest issues and will factor it into its analysis.<sup>55</sup> The Commission will need a record to make the public interest determination and the CPUC has provided the most extensive record a state commission has developed on the public interest issue.<sup>56</sup> As the Commission has noted, “[w]e believe that the state commissions’ knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs’ local markets to competition.”<sup>57</sup> The Commission should attach substantial weight to the evidence elicited in the CPUC proceeding, and the determinations made based on the evidence, in determining whether Pacific Bell’s application is in the public interest. As shall be demonstrated further below, both the evidence and the CPUC’s determinations are highly relevant to this Commission’s public interest determination.

**D. The CPUC Found That Pacific Bell’s Application Was Not In the Public Interest**

The CPUC found that Pacific Bell’s application was not in the public interest. The CPUC noted:

While Pacific largely satisfies the technical requirements of Section 271, in accordance with Section 709.2 we cannot state unequivocally that we find Pacific’s imminent entry into the long distance market in California will primarily enhance the public interest. Local telephone competition in California exists in the technical and quantitative data; but it has yet to find its way into the residences of the majority of California’s ratepayers.<sup>58</sup>

The CPUC stated that “we foresee the harm to the public interest if actual competition in California maintains its current anemic pace, and Pacific gains intrastate long distance dominance to match its local influence.”<sup>59</sup> Specifically, the CPUC found that:

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<sup>55</sup> *Arkansas/Missouri 271 Order*, at ¶ 126 and n. 401.

<sup>56</sup> *See Sumpter Affidavit* at ¶¶ 9, 12.

<sup>57</sup> *Ameritech Michigan 271 Order* ¶ 30.

<sup>58</sup> CPUC 271 Order at 4.

<sup>59</sup> CPUC 271 Order at 261.

While we make the determination that all competitors have fair, nondiscriminatory, and mutually open access to exchanges, the record does not support our making the determinations that Pacific has manifested no anticompetitive behavior, has established no improper cross-subsidization, or poses no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.<sup>60</sup>

In fact, the CPUC imposed certain conditions on Pacific Bell designed to mitigate the harm to the public interest that its application creates. The CPUC required Pacific Bell: i) to submit a report on the feasibility of structurally separating the company into wholesale and resale entities; ii) to participate in an investigation to examine the efficacy, feasibility, structural implementation, and selection criteria for selection of a competitively neutral third-party PIC administrator for California; and iii) to subject itself to certain joint marketing restraints, to track and report its marketing of long distance service, and allow Staff to audit its long distance affiliate's marketing costs.<sup>61</sup> The CPUC reiterated that Pacific's "less than complete progress has given California technical, not actual, local telephone competition."<sup>62</sup>

Pacific has intimated that it may challenge the imposition of these conditions. It notes in its application that "to the extent the CPUC ultimately adopts any conditions that purport to block Pacific's entry into the intrastate interexchange market, those would be preempted, and we accordingly need not address them here."<sup>63</sup> Pacific Bell has repeatedly argued that Sec. 709.2(c) is preempted by the Telecommunications Act of 1996. Vycera submits that this is wrong for several reasons, including the explicit language of Section 601(c)(1) of the Telecommunications Act of 1996,<sup>64</sup> Section 261 (b) of the Communications Act,<sup>65</sup> and section 253(b) of the

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<sup>60</sup> CPUC 271 Order at 3.

<sup>61</sup> CPUC 271 Order at 265.

<sup>62</sup> CPUC 271 Order at 265.

<sup>63</sup> Pacific Bell at 95.

<sup>64</sup> Section 601(c)(1) states: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments."

Communications Act.<sup>66</sup> There is nothing inconsistent between Sec. 709.2(c) and the Communications Act.

Nevertheless, it is clear that Pacific Bell will attempt to impede the application of the CPUC's conditions. Thus, it is critical that the Commission place significant weight on the public interest concerns voiced by the California Commission and the commenters in this proceeding, consistent with the mandate set forth in Section 271(d)(3)(C) that the Commission may not grant Section 271 authorization unless the requested authorization is consistent with the public interest. It is clear upon an examination of the specific harms to the public interest Pacific Bell's entry into the long distance market would create that denial of the application is mandated.

#### **1. Pacific Bell's Anticompetitive Conduct**

The Commission has found data on the "nature and extent of actual local competition" to be relevant to its public interest inquiry.<sup>67</sup> If there is a lack of competitive entry then the Commission will examine if this lack of entry is due to "the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason."<sup>68</sup> The CPUC noted that Pacific Bell has been found to engage in anticompetitive behavior. Specifically the CPUC noted two significant instances. The first instance was a 1996 lawsuit filed by AT&T and Sprint against Pacific Bell and its affiliates which involved Pacific Bell's planned use of the long distance carriers' billing information in

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<sup>65</sup> Section 261(b) states: "Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."

<sup>66</sup> Section 253(b) states: "State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

<sup>67</sup> *Ameritech Michigan 271 Order* at ¶ 391.

<sup>68</sup> *Id.*

connection with one of its programs. As the CPUC noted, the U.S. District Court for the Northern District of California found for the long distance carriers on the following grounds – i) breach of the billing agreements; ii) a violation of Section 222(a) of the Communications Act requiring telecommunications carriers to protect the confidentiality of proprietary information of other carriers; and iii) a misappropriation of trade secrets in the form of proprietary billing databases.<sup>69</sup>

This type of anticompetitive conduct is highly relevant to considerations of the public interest. Moreover, misuse of proprietary data goes to the very heart of the joint marketing issue which will be discussed further in the next section. If Pacific Bell was misusing information of other companies to leverage additional control in a monopoly market, imagine what it would do when it seeks to make inroads in a competitive market.

The CPUC also references a case involving CalTech International Telecom Corporation where Pacific Bell was found liable for unlawful monopolization of the local exchange telephone market in violation of 15 U.S.C. § 2.<sup>70</sup> The only thing Pacific Bell offers in retort to this instance of anticompetitive conduct is that the conduct occurred six years ago and that the case was ultimately settled.<sup>71</sup> As the CPUC correctly found, however:

Although eventually settled, the two federal court proceedings present findings of anticompetitive conduct. The case regarding AT&T, MCI and Sprint also involved the "unfair use of customer contacts generated ... by the provision of local exchange telephone service." (Section 709.2(c)(2).) The CalTech International case found "unlawful monopolization," and was rendered less than two years ago.<sup>72</sup>

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<sup>69</sup> CPUC 271 Order at 219, n. 391. Pacific Bell attempts to suggest that it was ultimately exonerated on these actions. The facts do not support this assertion. Since the matter was ultimately settled, the issues were never adjudicated. However, far from being exonerated, there were clear issues as to the propriety of Pacific Bell's actions. Pacific Bell's conduct was certainly sufficiently anticompetitive to support a preliminary injunction. *See* CPUC 271 Order at 219.

<sup>70</sup> *See* CPUC 271 Order at 220.

<sup>71</sup> Pacific Bell Application at 97.

<sup>72</sup> CPUC 271 Order at 220.

These two cases illustrate Pacific Bell's use of its monopoly power and its improper use of customer contacts generated by its provision of its local service. These two factors leveraged together can give Pacific Bell a virtually insurmountable advantage when it enters the long distance market.

## **2. Pacific Bell Will Utilize A Combination of Joint Marketing and Cross-Subsidization to Impede Competition**

As commenters in the CPUC 271 proceeding established, Pacific Bell has a huge advantage in joint marketing even before any specter of anticompetitive conduct is introduced into the equation.<sup>73</sup> The CPUC concurred finding that:

However, we differ from the FCC's view that permitting the incumbent to joint market its long distance affiliate's services to incoming callers is a harmless and nondiscriminating advantage. Specifically, we are mindful that unrestricted use of customer contacts could be unfair and jeopardize customer service. However, there are ways of addressing this issue through marketing rules and equal access disclosure.<sup>74</sup>

The marketing rules the CPUC seeks to apply, however, are likely to be challenged by Pacific Bell; thus, they provide little assurance that the discriminating advantage that Pacific possesses will be mitigated.

In addition, as revealed in the CPUC 271 proceeding, Pacific's long distance affiliate will be receiving this marketing advantage at prices far below cost. The CPUC found that the cost analysis regarding Pacific Bell's proposed joint marketing plan "demonstrates cross-

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<sup>73</sup> See, e.g., Comments of PacWest filed in CPUC 271 proceeding. ("The joint marketing advantage conferred by Pacific's local monopoly position is monumental in scope. Pacific receives several million incoming customer service calls per year from its existing local service customers. Pacific fully intends to make each one of these into a marketing opportunity for SBC-LD using Pacific customer service representatives. No other interLATA competitor in California has any similar massive opportunity (monopoly-based or otherwise) to address incoming calls from potential interLATA customers. As Dr. Selwyn explains, the ability to address *incoming calls* from customers with local service issues, and the customer's perception that these issues will now will be addressed only if the customer cooperates with an SBC-LD sales pitch, is far different than making millions of *outgoing cold calls*." ) PacWest Comments filed in CPUC 271 proceeding, citing Selwyn Affidavit, ¶¶ 54-55.

<sup>74</sup> CPUC 271 Order at 218-219.

subsidization may exist, and we find it very troubling.”<sup>75</sup> The CPUC stated that since its “confidence in non-structural safeguards has waned significantly over the years, we will request Commission staff to audit Pacific’s joint marketing arrangements with PBLD . . . .”<sup>76</sup> Once again, Pacific Bell’s willingness to comply with these requirements is in question as it has unilaterally deemed that “there is no reasonable basis for concluding that there remains a risk of cross-subsidization.”<sup>77</sup>

The fact that the history of the marketing practices of Pacific is a checkered one at best does little to add confidence that Pacific Bell will not use its monopoly control and access to customer information to a discriminatory advantage. On April 6, 1998, UCAN filed a complaint alleging that Pacific Bell was: i) persuading customers to switch from complete Caller ID blocking to selective blocking by providing incomplete and misleading information about the service and the level of privacy protection it provided; ii) marketing packages of services under the name "The Basics" and the "Basics Plus" which suggest that the services are basic telephone service rather than a package of optional features; iii) offering the most expensive inside wire repair service first and only telling customers of a lower-priced option if they reject the first; iv) unlawfully using and disclosing customer proprietary network information, and iv) employing sales programs and practices which operated to the detriment of customer service and quality customer information.<sup>78</sup>

The CPUC found that Pacific Bell failed to sufficiently inform customers regarding the number blocking options to prevent a caller's number from being displayed on a Caller ID

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<sup>75</sup> CPUC 271 Order at 256.

<sup>76</sup> CPUC 271 Order at 256.

<sup>77</sup> Pacific Bell Application at 98.

<sup>78</sup> *The Utility Consumers' Action Network v. Pacific Bell*, Case 98-04-004, Opinion Granting Compensation Award, D.02-03-038 (March 21, 2002).

device. It also found that Pacific Bell's marketing policy of sequentially offering packages of services in descending order of price fails to sufficiently inform customers because they are not told of the lesser priced package unless they refuse the more expensive option. The PUC also held that Pacific Bell could not use the Universal Lifeline Telephone Service subsidy program as a link to market other optional services, and that "The Basics," a package of optional services, inaccurately suggests a relationship with basic telephone service. To remedy these violations, the CPUC ordered Pacific Bell to (1) notify customers who were affected by its violations and make any necessary corrections, (2) pay a \$25.55 million fine, and (3) revise Tariff Rule 12 to ensure that customer service requests are fulfilled prior to subjecting customers to marketing pitches.<sup>79</sup> Pacific Bell's history does little to elicit confidence that it will conduct its joint marketing in a way that will not harm the public interest.

### **3. Grant of Pacific Bell's Application Would Harm the Interexchange Market**

The Commission should be vigilant to ensure against the danger of a premature grant of Section 271 authority. If an RBOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.<sup>80</sup> As Dr. Cooper of the Consumer Federation of America noted:

[t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or 'competitive imbalance,' in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a

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<sup>79</sup> *Id.*

<sup>80</sup> *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001) ("CFA CA Comments").

competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.<sup>81</sup>

As the Commission has also noted:

Section 271, however embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.<sup>82</sup>

While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market remains open after BOC entry.<sup>83</sup> The present and future state of competition is not promising in the Pacific Bell region.

Pacific Bell's past public filings with the FCC state that, at the end of 1997, Pacific had 17.1 million access lines in service,<sup>84</sup> all of which were served using loops that Pacific owns and controls. That figure increased, by 700,000 lines, to 17.8 million lines at the end of 1998.<sup>85</sup> According to Pacific Bell, it currently holds about 80% of the ILEC local lines in California,<sup>86</sup> and serves about 17.5 M lines as of April of 2001.<sup>87</sup> The most recent FCC survey results for California indicates that CLECs serve about 1.667 million lines.<sup>88</sup> About 20% of those lines

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<sup>81</sup> *Id.*

<sup>82</sup> *Ameritech Michigan 271 Order* at ¶ 388.

<sup>83</sup> *Id.* at ¶ 390.

<sup>84</sup> *See Responses to CCB Survey on the State of Local Competition*, commissioned by the Federal Communications Commission for 1997 and 1998 (hereinafter "FCC Local Competition Survey"). As the FCC explained on the cover page to the initial survey, on February 20, 1998, large telephone companies were asked to complete "a short survey on the state of local competition at the end of 1997 for each state in which the company or affiliate .... serves as an incumbent local exchange carrier." An electronic version of all the surveys is available on the FCC's web site at <[http://www.fcc.gov/ccb/local\\_competition/survey/responses/](http://www.fcc.gov/ccb/local_competition/survey/responses/)>.

<sup>85</sup> Included in the 17.8M line figure are residential and business lines; local payphones lines are excluded.

<sup>86</sup> Sumpter Affidavit at ¶ 26, *citing*, Tebeau Affidavit, Table 4.

<sup>87</sup> Pacific Bell Application, Affidavit of J. Gary Smith at ¶ 8, n. 8.

<sup>88</sup> FCC Local Competition Report, February 27, 2002, Table 6.

would be in Verizon service territory, leaving approximately 1.33 million CLEC lines in Pacific Bell's service territory. Given those results, CLECs serve about 7.6% of the Pacific Bell market. In the FCC's latest *Local Competition Report*, the CLEC market share in California was lower than the CLEC market share in Colorado, the District of Columbia, Georgia, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Virginia.<sup>89</sup> The CLEC market share in California was less than a third of the market share in New York (23%) and half of the market share in Texas (14%), two states to which Pacific likes to compare California favorably.<sup>90</sup> In fact, the CLEC market share in California was lower than nationwide average of 9%. Thus, the most populous state in the nation is a state that has seen competition which the CPUC itself terms "anemic."

There is a significant danger that Pacific Bell will use its local monopoly to leverage control in the long distance market and ultimately dampen competition in both markets. Texas is an illuminating example. The danger of a premature grant of Section 271 authority in California would be to diminish further the prospects of local competition and allow Pacific Bell to leverage its local monopoly market power in the long distance area. AT&T provides a very cautionary tale. AT&T notes how the Public Utility Commission of Texas filed a report earlier this year on the state of local competition in Texas. As AT&T chronicles:

The *TPUC Report* makes clear that even today, a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. CLEC competition for residential customers, while initially active, has faded, as experience has demonstrated that entry into local residential markets is not profitable. This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long

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<sup>89</sup> FCC Local Competition Report, February 27, 2002, Table 6.

<sup>90</sup> FCC Local Competition Report, February 27, 2002, Table 6.

distance services, and having established its market power, to raise its price for long distance service.<sup>91</sup>

The unprecedented market share gains for RBOCs when they enter long distance markets is by now well documented. In fact, Pacific trumpets the statistics in its application. After only six months in Texas, SBC had 1.7 million long-distance lines; after only nine months, that number had grown to 2.1 million lines. Twelve months after entry in Texas and four months after entry in Oklahoma and Kansas, SBC had a total of 2.8 million long-distance lines in service.<sup>92</sup> These statistics are blindly proffered as purportedly demonstrating that such market entry is good in and of itself. The Texas experience suggests that one must look beyond the numbers and see what is transpiring in the market. As AT&T noted, “the lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and having established its market power, to raise its price for long distance service.”<sup>93</sup> California is at greater risk for such an occurrence because not only is there less competition in California, but also because of Pacific Bell’s history of anticompetitive practices and questionable marketing practices.

There is a further risk of harm to the long distance market. When an RBOC enters a long-distance market there is an additional inherent conflict of interest in regard to its role as administrator of primary carrier (“PC”) changes. The RBOC can easily abuse the PC change process as an avenue for both customer retention and procurement. Unless the PC administration function is put in the hands of a competitively neutral third party, Pacific can abuse its position as a non-neutral PC administrator. As discussed in greater detail below, Pacific Bell already has demonstrated its ability to abuse the PC administration function in the context of intraLATA toll.

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<sup>91</sup> CC Docket No. 01-194, Comments of AT&T Corp. at 88-89 (September 10, 2001).

<sup>92</sup> Pacific Bell Application at 84.

In the CPUC 271 proceeding, the CPUC discussed the results of its audit of Pacific Bell's intraLATA PC administration, emphasizing that "there were problems with a significant percentage of Pacific's reporting of intraLATA PIC disputes after we approved intraLATA competition."<sup>94</sup> As a result, the CPUC found:

There is a reasonable question as to the appropriateness of relying on Pacific to determine a PIC/LPIC dispute, and to assess a slamming switching fee onto competing interexchange carriers. Further, it is reasonable to question the appropriateness of the Commission's enforcement staff continued reliance on Pacific's PIC dispute reports. We find that absent competitively neutral and nondiscriminatory PIC dispute reporting and administration there is a possibility that the interstate interexchange market will be harmed through increasing carrier conflicts.<sup>95</sup>

Accordingly, the CPUC plans to initiate an investigation to examine the "efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third-party administrator."<sup>96</sup> Pacific Bell asserted that "there is nothing in the record to call into question Pacific's actual performance as the PIC administrator," suggesting much objection on the part of Pacific Bell to implementing this proposal. (Vycera provides below for the record in this proceeding a description of its own experience with respect to Pacific Bell's anticompetitive intraLATA toll PC change practices.) As the CA PUC observed, "Pacific's dismissive rejection of the interested parties' proposals lacked not only supporting data but also any willingness to address the parties' concerns or perceptions."<sup>97</sup> For these reasons, and as discussed in greater detail below, Vycera submits that grant of Pacific Bell's application is not in the public interest, and accordingly should not be granted, until and unless a competitively neutral third party

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<sup>93</sup> CC Docket No. 01-194, Comments of AT&T Corp. at 88-89 (September 10, 2001).

<sup>94</sup> CPUC 271 Order at 260.

<sup>95</sup> CPUC 271 Order at 260.

<sup>96</sup> CPUC 271 Order at 263.

<sup>97</sup> CPUC 271 Order at 263.

administrator is established to administer these functions in an independent and neutral manner in California.

**4. Pacific Bell's Win-Back Practices and Related Abuse of its Position as PC Administrator Are Anticompetitive and Harmful to Competition**

Vycera has experienced first-hand the effects of Pacific Bell's anticompetitive win-back practices and related abuse of its position as intraLATA toll PC administrator. After the California intraLATA toll markets became open to competition in May, 1999, Vycera began submitting customer primary carrier "PC" change orders to Pacific Bell for intraLATA toll service. The number of alleged PC change disputes that Pacific Bell attributed to Vycera increased dramatically once Vycera began selling intraLATA toll service in competition with Pacific Bell, from a range of 2-3% prior to Vycera's entry into the California intraLATA toll market, to as high as 25% thereafter. Vycera subsequently ceased selling intraLATA toll service in Pacific Bell service areas as a result of Pacific Bell's imposition of PC change charges. As a result, the rate of alleged PC change disputes that Pacific Bell attributed to Vycera quickly dropped back down. On one occasion Vycera again attempted to sell intraLATA toll services in Pacific Bell territories, with a concomitant dramatic resurgence in Pacific Bell-alleged PC disputes. In February, 2001, Vycera again ceased selling intraLATA toll in Pacific Bell services territories; thereafter the number of alleged PC disputes attributed to Vycera by Pacific Bell again dropped down to 2-3%.

In addition to being subject to Pacific Bell reporting to the California Commission and the FCC as alleged "slams," each of the alleged disputed PC changes entail a substantial charge (two times the PC change fee). Accordingly, Vycera's Pacific Bell bill for charges for alleged PC changes increased from an average of \$1900 per month (when it did not sell intraLATA toll

services in Pacific Bell service areas) to over \$34,000 per month (during periods in which Vycera offered intraLATA toll services in competition with Pacific Bell).<sup>98</sup>

The numbers make clear that there are anticompetitive processes, practices, and/or policies with respect to Pacific Bell (and SBC-SWBT's) administration of the PC change process for intraLATA toll service which lead to severely anticompetitive effects. As a result of such practices by Pacific Bell (and by SBC-SWBT in Texas), Vycera had no economic choice but to cease offering intraLATA toll services to its customers and prospective customers in California (and in Texas), in order to avoid the imposition by Pacific Bell of additional exorbitant alleged PC change charges, and the reporting by Pacific Bell of dramatically inflated numbers of alleged PC change disputes incorrectly attributed to Vycera, (not to mention the substantial expenditures of time, effort and expense in attempting to resolve the inflated numbers of disputed PC change charges.)<sup>99</sup>

During the same periods of time, Vycera marketed intraLATA toll services in other jurisdictions, including Verizon f/k/a GTE service areas in California and Texas, U S West in Arizona, Colorado, New Mexico, and Utah, and SBC-SWBT in Texas. The numbers of alleged PC change disputes did not increase in Verizon f/k/a GTE California territories nor in other states and ILEC territories as a result of Vycera's entry into the intraLATA toll markets in those jurisdictions (with the exception of SBC-SWBT in Texas, which appears to be engaging in anticompetitive practices similar to Pacific Bell's practices). Vycera uses the same sales scripts, the same TPV scripts, and the same independent third party verifier in all jurisdictions in which it provides services; thus, the only logical explanation for the dramatic increase in the number of alleged PC change disputes recorded by Pacific Bell during periods when Vycera offered

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<sup>98</sup> See Affidavit of Derek M. Gietzen (Oct. 9, 2002) ("Gietzen Affidavit"), attached as Exhibit 6 hereto.

intraLATA toll services in Pacific Bell areas is that they were caused by Pacific Bell practices, policies or procedures.<sup>100</sup>

The dramatically increased numbers of PC change disputes alleged by Pacific Bell after Vycera (and other carriers) began selling intraLATA toll in Pacific Bell service areas are consistent with the results of the audit of intraLATA LPIC disputes undertaken at Pacific Bell's expense by the California Commission's Consumer Services Division ("CSD"). In the CPUC 271 Order, the California Commission emphasized that the CSD audit revealed "problems with a *significant percentage* of Pacific's reporting of intraLATA LPIC disputes" after the Commission approved intraLATA competition.<sup>101</sup>

Vycera has reason to believe, based on information and belief, and based on its own experience and the drastically increased number of alleged PC disputes registered by Pacific Bell during periods when Vycera has attempted to compete with Pacific Bell for intraLATA toll customers, that the majority of disputed PC change charges have resulted from Pacific Bell's anticompetitive win-back practices in combination with its exclusive position as a non-neutral PC change administrator.

To illustrate, as part of Vycera's investigation into the dramatic increase in PC disputes alleged by Pacific Bell after Vycera entered the intraLATA toll market, in June 1999, Vycera's

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<sup>99</sup> See Exhibit 6, Gietzen Affidavit.

<sup>100</sup> Vycera has valid recorded TPV documenting the customers' authorization for each of the alleged PC change disputes. However, since Pacific Bell has eliminated from its tariff the option for carriers to provide evidence to rebut an allegedly disputed PC change (by means of TPV, for example), as a practical matter there is no mechanism by which Vycera or other carriers may challenge the alleged PC change disputes registered by Pacific Bell, since in the vast majority of cases there is no customer dispute on file with any Commission documenting the alleged PC disputes. In the absence of a customer complaint, Vycera and other CLECs have no established forum in which to contest and disprove an alleged PC dispute registered by Pacific Bell. As a result, Pacific Bell takes the customer back, charges Vycera (and other carriers) two times the PC change fee, and reports the alleged PC dispute to the California Commission and to the FCC – all without any documentation that the customer ever indicated that the switch away from Pacific Bell to a competitor was unauthorized in the first instance.

<sup>101</sup> CPUC 271 Order at 260 (emphasis added).

President, Derek Gietzen, placed a request that his own local toll service be switched from Pacific Bell to Vycera. Pacific Bell promptly sent Mr. Gietzen a letter stating that “[o]ur records show that you have discontinued local toll service with Pacific Bell,” and encouraging Mr. Gietzen to “switch back to Pacific Bell now.” The bottom of the letter included a form entitled, “Bring me back home to Pacific Bell today!,” including a box to be checked off by the recipient stating, “YES, switch my phone service back to Pacific Bell (and credit my account \$5.26 for the switching fee).” (A copy of the letter is attached hereto as Exhibit 7.) Mr. Gietzen signed the form and returned it to Pacific Bell. Thereafter, Mr. Gietzen’s request to “switch back” to Pacific Bell was reported by Pacific Bell as an *unauthorized carrier change*. Accordingly, Vycera was billed two times the switching fee. Mr. Gietzen never spoke with anyone at Pacific Bell about the account, and never claimed that the carrier change was unauthorized. He merely filled in the form at the bottom of Pacific Bell’s form “win-back” letter for intraLATA toll service, agreeing to change his intraLATA toll service back to Pacific Bell. The Gietzen example clearly demonstrates that Pacific Bell’s practices are *creating* the alleged unauthorized intraLATA toll carrier changes being attributed to Vycera by Pacific Bell.<sup>102</sup> Vycera believes that this is the case both for customers that Pacific Bell “switches back” to Pacific Bell’s

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<sup>102</sup> Predictably, SBC’s attorneys claim that this was just, in effect, the result of a “manual procedure error” that is not indicative of any problem with SBC win-back practices or its PC administration. To the contrary, Vycera believes that the Gietzen win-back example is concrete evidence that Pacific Bell’s win-back practices in combination with its exclusive position as non-neutral PC change administrator provides Pacific Bell with anticompetitive opportunities to create baseless allegations of PC disputes. Moreover, in correspondence with Vycera regarding these issues, SBC’s attorneys have affirmatively stated on several occasions that it is Pacific Bell’s practice to register PC change disputes against other carriers as a result of its win-back calls to customers. Vycera submits that it is extremely anticompetitive for Pacific Bell to register alleged PC disputes against competitor carriers in the context of any win-back call or correspondence, because this provides Pacific Bell representatives with the exclusive anticompetitive opportunity to automatically register alleged PC disputes against competitors where no such customer dispute exists. Pacific Bell’s practice of using its win-back calls as the opportunity to create alleged PC change disputes also violates the Commission’s slamming rules, which forbid PC change administrators such as Pacific Bell from independently verifying subscriber PC change requests. 47 CFR § 64.1120(a)(2). Pacific Bell may not flout the Commission’s rules by simply deferring its independent verification of subscriber PC change requests until the win-back stage.

intraLATA toll service by telephone and by written request (such as the form sent to Mr. Gietzen).

As demonstrated by the Gietzen win-back example, Pacific Bell's representatives have complete discretion and control over how intraLATA toll PC change requests (and information resulting from their win-back efforts) are processed, characterized, and reported to the California Commission. In the past, prior to intraLATA toll equal access, Pacific Bell processed carrier change disputes regarding long distance service as a neutral third party, given that Pacific Bell was not providing the service and (presumably) had nothing to gain by mischaracterizing or improperly processing carrier change requests. However, in the context of intraLATA toll PC requests, Pacific Bell is not a neutral third party. To the contrary, it has anticompetitive incentives to "win back" the customer *and* to charge two times the carrier change fee to the competing carrier. The same is true, and likely would have even greater anticompetitive consequences, in the context of Pacific Bell's requested in-region long distance authority in California if Pacific Bell were allowed to act as a non-neutral administrator of PC changes for long distance service.

Vycera is not the only carrier that has suffered the effects of Pacific Bell's anticompetitive win-back practices and its abuse of its position as PC change administrator. AT&T filed a complaint with the California Commission on December 21, 1999 regarding the same types of issues. AT&T's complaint alleged, among other issues, that Pacific Bell's win-back policies are in violation of the California slamming rules, the Federal slamming rules and are in violation of the Federal Communications Act, and that Pacific Bell's practices resulted in the assessment of inflated numbers of improper PC change fees. It is our understanding that SBC settled the matter with AT&T (under undisclosed terms) rather than defending the case

before the California Commission. *See* Exhibit 8, Complaint, *AT&T Communications of California, Inc. v. Pacific Bell*, Case No. 99 12 029, filed Dec. 21, 1999.

Moreover, the California Commission itself has recognized and documented that there are serious problems with Pacific Bell's PC administration practices which, if allowed to continue in the context of long distance service, could jeopardize interexchange competition in California.<sup>103</sup> The California Commission stated in the CPUC 271 Order that SBC Pacific Bell denies any problems with its reporting of intraLATA LPIC disputes even though the California Commission's Consumer Services Division ("CSD") found problems with a "significant percentage" of Pacific's reporting of intraLATA LPIC disputes after the California Commission approved intraLATA competition.<sup>104</sup> The California Commission also noted that, in response to concerns addressed by AT&T during oral argument regarding the need for unbiased PC administration, Pacific Bell "failed to offer any assurance that it would perform its LPIC role with any safeguards of neutrality or sensitivity to competitor concerns."<sup>105</sup>

It is disconcerting, but also telling, that SBC Pacific Bell refuses to admit that there are any problems with its practices, even in the face of the California CSD's audit which revealed serious problems with Pacific's reporting of intraLATA LPIC disputes after the California Commission approved intraLATA competition. Similarly, in Vycera's experience in attempting to resolve disputed intraLATA PC change charge issues with Pacific Bell, SBC's attorneys have refused to address Vycera's concerns, but instead write off as innocent errors specific examples

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<sup>103</sup> CA CPUC 271 Order at 260.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

of cases where Pacific Bell's abuse of its position as PC change administrator are evident – such as the Gietzen win-back letter response (attached hereto as Exhibit 7).<sup>106</sup>

In summary, Pacific Bell's unique position as non-neutral PC change administrator allows it to indiscriminately register alleged PC disputes against competitors as a result of win-back calls and win-back written materials (and to directly benefit from this by assessing PC change charges and fees against those competitors). Particularly given that Pacific Bell does not allow carriers to provide evidence of customer authorization and verification (such as third party verification) to counter alleged PC disputes, Pacific Bell has nothing to lose and much to gain by registering PC disputes against carriers where none exist. As a practical matter, Pacific Bell has effectively shut down Vycera as an intraLATA toll competitor as a result of such anticompetitive practices. Despite its reluctant discontinuance of intraLATA toll service offerings in Pacific Bell service areas, Vycera continues to provide local exchange and long distances services in Pacific Bell and Verizon-GTE service areas in California, providing California customers with an alternative choice of carriers in a rapidly shrinking pool of competitors. While Vycera is handicapped by its inability as a practical and economic matter to provide intraLATA toll service in Pacific Bell areas due to Pacific Bell anticompetitive practices, the potential effect on Vycera's ability to continue providing local and long distance services in California could be devastating if the Commission were to grant Pacific Bell Section 271 authority while allowing Pacific Bell to remain a non-neutral PC change administrator. The Commission should deny Pacific Bell's request for 271 authority in light of these and other anticompetitive practices, and

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<sup>106</sup> See discussion regarding Gietzen win-back letter *supra* at pps. 32-34. Alleged PC disputes resulting from customers such as Derek Gietzen simply sending back a win-back form to Pacific Bell are brushed off by SBC as one-time errors. It is not inherently clear how a simple win-back form could ever lead to Pacific Bell coding the entry as an alleged PC change unless some sort of practice or policy precipitated it.

at a minimum should not consider granting such a request until the California Commission has implemented a competitively neutral third party administrator of PC changes.

**E. Considering All the Factors, Pacific Bell's Application Clearly Is Not In The Public Interest**

Pacific Bell states that the “critical question is whether the July 23 Proposed Decision’s [draft version of CPUC decision] discussion of the public interest calls into doubt the conclusion that the local exchange market is open.”<sup>107</sup> Vycera agrees that this is the critical question and the answer is unequivocally that the CPUC’s public interest analysis does call into question whether the market is open. The CPUC explicitly stated that “Pacific’s less than complete progress has given California, technical, not actual, local telephone competition.”<sup>108</sup> Pacific has used a combination of its monopoly control over the local exchange market, its access to customer information, and anticompetitive practices to obtain a stranglehold on the local market. Now it seeks to extend such control to the long distance market. Such an action would imperil competition in the long distance market, and further dampen the limited competition in the local market.

Pacific also contends that the CPUC’s public interest analysis fails to rebut the presumption that if the competitive checklist is satisfied, BOC entry into the long distance market will benefit consumers and competition.<sup>109</sup> First, as noted above, the public interest standard goes beyond the requirements of the competitive checklist and is an independent standard. Second, the CPUC found that Pacific Bell did not meet two checklist items. Thus, even if there is such a presumption, Pacific fails to establish the predicate for the presumption.

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<sup>107</sup> Pacific Bell Application at 100.

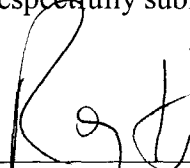
<sup>108</sup> CPUC 271 Order

<sup>109</sup> Pacific Bell Application at 99.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should deny Pacific Bell's application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. J. Donovan', written over a horizontal line.

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